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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, ELLEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MORRIS L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF OF APPELLANTS

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant
Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant
Westmoreland Resources, Inc.

March, 1981

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
ANNE E. FONTAINE
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
THOMAS A. BUDEWITZ
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants
except Western Energy Company

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REPLY BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Montana asserts that the states possess an unfettered power to tax, free from any constitutional restraint or scrutiny. Significantly, Montana fails to acknowledge or defend the practical consequences of this position—that it may impose a severance tax in any amount no matter how high, notwithstanding the undue burden such a tax may cast on interstate commerce.

Despite a number of vague references—none with record support—concerning the sort of governmental costs which might justify severance taxes, this case does not involve any rough correspondence between such costs and this tax. It does involve an attempt by one state, fortuitously endowed with a vital natural resource, most of it federally owned, to use its taxing power to shift literally billions of dollars to its coffers from consumers in other states. From this posture, Montanans have accurately portrayed themselves as the "blue-eyed Arabs."[1] One

1 A characterization employed by then-Governor Judge in describing Montana's coal windfall. *Boom in Strip Mining: Windfall for Montana*, Washington Post, May 22, 1977, at 1.

consequence of acquiescing in Montana's position would be the Balkanization of this nation over access to necessary energy resources. Significantly, Montana offers no response to this assertion either.

In plaintiffs' view, both the negative implications of the Commerce Clause and the affirmative force of existing federal legislation ultimately restrain the power of the states to collect taxes such as Montana's.[2] If that be so—if there is any federal principle limiting such state power—this case should be reversed and remanded for trial.

ARGUMENT

I. THE SEVERANCE TAX IS NOT IMMUNE FROM SCRUTINY UNDER AN APPROPRIATE COMMERCE CLAUSE TEST

Montana has few supporters, even among those who ultimately support the tax here, for its view that the scope of the Commerce Clause continues to be limited by *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). Its arguments have been fully answered in our opening brief. It is clear that both the United States and the states supporting Montana concede that the Clause may be used as a vehicle to examine, and to limit, this state tax. As the Solicitor General put it (Brief for the United States at 22):

> [W]e agree with Appellants . . . that Montana's Severance Tax is not altogether immune from Commerce Clause scrutiny on the theory that mining is a purely 'local' activity.

The briefs submitted by virtually all of the *amici*, even those opposing our position, are in accord with this view.[3]

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2 Montana's spurious, and newly raised, claim that Section 32 of the Mineral Lands Leasing Act of 1920 (41 Stat. 450, 30 U.S.C. § 189 (1976)) shows an intent to grant unfettered discretion to tax to the states is dispelled at page 17, *infra*.

3 *E.g.*, Brief of the States of Wyoming, Colorado, Nevada, Idaho, Washington, and Oregon at 6. North Dakota and West Virginia did not

(Footnote continued)

II. THE COMMERCE CLAUSE CLAIM REQUIRES RESOLUTION OF FACTUAL QUESTIONS

If, then, Montana's tax may be measured under substantive Commerce Clause tests, there is no dispute that the standards of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89 (1977), are pertinent here. There is, however, substantial disagreement as to the meaning and application of two of its tests—whether the tax is "fairly related" to the benefits and protection provided by the State, and whether it discriminates against interstate commerce. These are the central disputed questions before the Court.

A. Whether A State Tax Is "Fairly Related To The Services Provided By The State" Raises Triable Issues Of Fact

While no case here has considered the question directly, the "fairly related" test has clear roots in a factual inquiry. This Court has stated repeatedly that the *Complete Auto* tests are focused on the "practical effects" of the tax in question, not on labels or artificial rules. Where taxes are "tailored," as this tax is, the Commerce Clause requires "special scrutiny." *Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 288-89 n.15. The "fairly related" test itself is expressly derived from *Ingels* v. *Morf,* 300 U.S. 290 (1937), in which a state tax was held invalid because a factual analysis showed it was excessive in relation to the governmental burdens imposed by the activity. *See Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 278 n.6.[4] *Washington Revenue Department* v.

(Footnote continued)

specifically address the issue, but adopted these views by reference. *See* Brief of North Dakota and West Virginia at 4 n.3. Arizona also adopted the Wyoming Brief by reference in its motion for leave to appear as *amicus*.

4 Each of the four principal cases cited in that note appears to support one of the four prongs of the test, standing, respectively, for discrimination (*Boston Stock Exchange* v. *State Tax Commission*, 429

(Footnote continued)

Stevedoring Association, 435 U.S. 734, 748 (1978), underscored the necessity for examining the facts:

> *Complete Auto* recognized that a state has a significant interest in exacting from interstate commerce its fair share of the cost of state government. . . . All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity. [Citations omitted].

Neither Montana nor the *amici* supporting it satisfactorily explain how the Court can give "special scrutiny" to the "practical effects" of this tax, or determine whether it exacts "more than a just share," without a factual inquiry at a trial.

For its part, Montana takes the view (Brief of Appellees at 22-27) that the test is satisfied whenever a state provides the benefits of a civilized society, a standard which could be met in any case and under any circumstances, thus vitiating the test entirely, notwithstanding the required scrutiny of the "practical effects" of any tax. (*See* Brief of Appellants at 29-31).[5] We do not believe that this Court has created and reiterated a meaningless test, nor do we see how any such contention squares with the commitment to give "tailored" taxes "special scrutiny". Neither of the cases on which Montana relies (Brief of Appellees at 26)[6] for this position so held, nor was the

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U.S. 318 (1977)); nexus (*General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964)); apportionment (*Illinois Cent. R. Co.* v. *Minnesota*, 309 U.S. 157 (1940)); and fair relation (*Ingels* v. *Morf*, 300 U.S. 290 (1937)).

5 This is not to say that Montana misses any opportunity to present its version of facts which might justify severance taxes in some circumstances, thus attempting to have whatever benefits a factual record might provide without the burden of discovery—which was stayed at the outset of the case—or of permitting plaintiffs to prove their side of the case at a trial.

6 *See Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 100 S. Ct. 2109, 2122 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979).

issue whether the test raised factual questions determined.[7]

Most of our opponents here, including Montana, fail to respond to the point that any construction of this test which avoids factual inquiries renders the test meaningless. Those who do, give responses which are as varied as they are unconvincing.[8]

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7 In his concurring opinion in *Washington Revenue Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 764 (1978), Justice Powell remarked that the Court's conclusion concerning the record in the case "cannot be questioned." It strains credulity to argue, as Montana does (Brief of Appellees at 25-26), that this means that he would bar proof on this issue in all future cases. *Compare City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 379 (1974) (Powell, J. concurring), where Justice Powell states, in an analogous context, that the Court's decision should *not* be read as barring proof in future cases.

8 Some *amici*, while agreeing that "the total impact costs of coal extraction activity are the proper constitutional boundary for Montana's Severance Tax," argue that this determination is to be made by some procedure short of a trial. (*See* Brief of Environmental Defense Fund, *et al.* at 4-7). Others appear to agree that the issue is one of fact, and attempt to justify the tax by existing or impending impact costs. (*See* Brief of Wyoming, *et al.* at 12-16). If such justifications exist, they remain to be shown in this case. Plaintiffs have alleged—and should be given the opportunity to prove—that no such justification exists here, either with respect to direct "impact costs" or with respect to any other costs—present or future—which Montana could legitimately claim. That is clearly an issue for trial.

Montana suggests (Brief of Appellees at 27), and several *amici* assert (*e.g.*, Brief of the Environmental Defense Fund, *et al.* at 8-10), that the tax is justifiable because the state may, in the future, face costs arising from "unknown" and unquantifiable environmental degradation or social costs. This, too, renders the test meaningless since such nebulous assertions are not susceptible to proof. Plaintiffs recognize the risks of environmental degradation and social costs associated with coal mining but, as a factual matter, strongly dispute the proposition that these risks are limitless and, as a legal matter, strongly dispute the proposition that the shibboleth of "unknown risk" should be substituted for reasoned factual analysis. This is a trial issue as well.

We are also told that "Montana is wisely setting aside in trust a part of its severance taxes so that future generations will not have to bear the cost of these burdens. . . . " (Brief of Appellees at 27 n.31). This

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The Solicitor General, apparently recognizing that Montana's approach leads only to the conclusion that the fairly related test is an "empty" one, erases the test in another way. His brief asserts that the "fairly related" test is simply an elaboration of the "nexus" or "apportionment" branches of the *Complete Auto* standard and that it is satisfied whenever the "measure" of a tax is related to the taxpayers' activity within the taxing jurisdiction, without regard to the "amount" of the tax or the "value" of the services and protection provided by the state. (Brief for the United States at 28-31). While this suggestion is linguistically ingenious, it simply underscores our position since it altogether fails to meet the serious objection that it, too, renders the test meaningless.[9] It takes little imagination to see that if a legislature is constrained simply to "measure" a tax by the value of the taxpayer's activity, but is free to set any tax rate it chooses—for example, 30% or 1,000% or 2,000%, to use the rates mentioned in this proceeding—it is not constrained at all. In the end, the Solicitor General's construction of the *Complete Auto* test, like the construction proposed by Montana, is no test at all.

In this connection, cases decided under the Due Process Clause[10] are of little relevance, since the purposes of the

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statement simply masks the truth—the Constitutional Trust, expected to accumulate several billions of dollars by the end of the century, bears no relation at all to any present or future costs. Whether it is "wise" depends on whether one expects to be a forced donor or a grateful beneficiary.

9 The Government's view is apparently based, in part, on a misapprehension of the origin of the test, which its brief attributes to "*General Motors, J.C. Penney*, and similar cases. *See* [*Complete Auto Transit, Inc.* v. *Brady*,] 430 U.S. at 279 n.8." (Brief for the United States at 28). But, as noted above (page 4), the fair share test actually traces its origins to *Ingels* v. *Morf*, 300 U.S. 290 (1937).

10 Montana refers to *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937), and other cases. (*See* Brief of Appellees at 24-25). Our observations are equally pertinent to *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 368 (1974), to which several *amici* refer. Neither involved interstate commerce.

Due Process and Commerce Clauses differ and the judicial standards necessary to their protection differ accordingly. State legislation which passes muster under the Due Process Clause may nevertheless violate the Commerce Clause. *E.g.*, *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533-34 (1949). The special role of the Commerce Clause in our federal system (*see id.* at 532, *et seq.*) has led the Court to its "special scrutiny" rule where the dangers of localism are apparent and where normal political checks and balances are likely to fail. (*See* Brief of Appellants at 27-28). Concepts of due process may not require any "fair relation" test; but, as this Court has repeatedly said, the Commerce Clause does impose such a standard.

Montana also objects to application of the "fairly related" test by attacking the competence of the courts to apply it, urging that enforcement of the test would burden the courts with additional complicated litigation which Montana believes ought to be left, in the end, to the legislative branch. We believe that all of these arguments reflect a misperception of the nature of the "fair relation" test, and of the respective roles of our courts and legislative bodies.

Contrary to several suggestions in the briefs of our adversaries and opposing *amici*, plaintiffs have never maintained that this or any other court should calculate an appropriate rate of tax.[11] In our view, that burden

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11 We wish to correct a misapprehension which may arise from a statement of the Montana Supreme Court that plaintiffs conceded that a tax of "perhaps twelve and a half to fifteen percent of the value of the coai" could be justified. (Opinion 7; Apdx. 9a). (*See* Brief of Appellees at 9 n.13). These figures were simply speculation on the part of plaintiffs' counsel at oral argument—not a substantive concession—following counsels' repeated insistence that the question could only be determined after trial. Plaintiffs have also supported bills in Congress to limit coal severance taxes nationwide to 12.5%, saying that that amount "more than takes care of any needs that any State could have." *Coal Severance Taxes, Hearings Before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign*

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falls, in the first instance, on the appropriate state legislatures. The question properly brought before a court is not whether the rate, itself, is correct, but whether there is some reasonable basis, founded on the needs of the state arising from the activities of the taxpayer, to support the amount of the tax. It is a particularly pertinent question where, as here, the subject of the tax has been narrowly drawn, directed to a specific activity—here, coal mining—and carefully selected to fall outside the taxing state. In such circumstances, we believe it is appropriate for the courts, *inter alia*, to examine whether the legislature had a reasonable basis for what it did; to review what studies it made and what justifications it found for the tax; whether the specific activity selected to tax in fact added to governmental costs and the extent thereof; whether the proceeds are being used for such added costs; whether they are in substantial part being cached away, in effect, for unrelated and unknown purposes—all to the end that a determination can be made as to whether the tax is fairly related to the benefits provided. In so doing, far from usurping any legislative function, the courts are carrying out their appropriate judicial responsibility.[12]

(Footnote continued)

Commerce, House of Representatives, on H.R. 6625, H.R. 6654 and H.R. 7163 (March 21 and June 5, 1980) (Serial No. 96-173) at 94. Plaintiffs would hope to show—and have solid basis for believing—that no such figure is actually justified. (*See* Brief of Appellants at 12).

12 Montana and several *amici* also raise the contention, familiar when any novel question is presented, that a decision in plaintiffs' favor will open the floodgates to similar suits. This, of course, is hardly an answer to an invasion of constitutional rights. *See Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). But, in any event, the suggestion lacks merit. This case is distinguished by (i) the grossly excessive nature of the tax and (ii) the relative rarity of the circumstances which gave rise to it. This is not a general tax measure of the sort typically subject to widespread opposition in the taxing jurisdiction. The tax falls on a specific activity, the mining of coal, uniquely suited to exportation of the tax burden. In these circumstances, it is unreasonable to suggest that application of constitutional principles to this situation will lead to a surge in tax litigation.

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State legislatures must have substantial latitude to adopt tax measures to generate necessary revenues, but their discretion must be exercised within constitutional bounds. Where—as here—a state legislature manifestly overreaches, this Court has repeatedly recognized that the "negative implications" of the Commerce Clause require the courts to impose judicial restraints:

> [T]he commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and . . . in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.

Southern Pacific Co. v. *Arizona*, 325 U.S. 761, 769 (1945). *See also Minnesota* v. *Clover Leaf Creamery Company*, 49 U.S.L.W. 4111, 4115 (Jan. 21, 1981); *Raymond Motor Transport, Inc.* v. *Rice*, 434 U.S. 429, 442-44 (1978); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 529-30 (1959).

Montana and others also argue that this matter ought to be left to Congress. The vigor with which they make this argument here is matched only by the enthusiasm with which they argued in Congress that the matter ought to be left to the courts,[13] and by the arguments of certain

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(Footnote continued)

Some *amici* have suggested that the "fair relation" test should not be applied here because it would give a windfall to plaintiffs. (*See* Brief of The Western Conference of The Council of State Governments at 24-25). This is not true. Just as they are permitted to pass tax increases through, plaintiffs are obligated to return tax savings to their customers, the ultimate consumers.

13 In testimony before the United States Senate just a few months ago, then-Governor Judge of Montana took the view that:

> The reasonableness of the [Montana Coal Severance] tax will be decided probably in the Supreme Court.
>
> * * * * *
>
> There you will decide on the reasonableness or the burden on interstate commerce and *that is a question most properly left to the*

(Footnote continued)

members of Congress, appearing here as *amici*, that the matter should be left to the state legislatures.[14]

The short answer is that Congress, the state legislatures, and the courts all have a proper role to play. Whether or not Congress may ultimately act to restrain a burden on commerce by a state serves as no basis for the argument that this Court should abdicate its responsibilities under the Commerce Clause and should refrain from construing the Constitution in the case presented to it here. *Compare Baker* v. *Carr*, 369 U.S. 186, 226 (1961) *with Colegrove* v. *Green*, 328 U.S. 549, 552 (1946). In the end, Congress cannot be expected to anticipate and expressly prohibit every abuse which may unduly burden interstate commerce.

B. Plaintiffs' Claim That The Tax "Discriminates Against Interstate Commerce" States A Valid Claim And Raises Triable Issues

Montana is in a position to exact a levy on an energy resource fortuitously located in that State, substantially

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(Footnote continued)

court and not determined by a committee of the United States Senate.

Coal Severance Tax: Hearings Before the Committee on Energy and Natural Resources, United States Senate, on S. 2695 (August 6, 1980) (Pub. No. 96-143) at 237 [hereinafter cited as "Hearings"]. (Emphasis supplied).

Governor Herschler of Wyoming testified similarly that the matter "should be determined by the United States Supreme Court. . . ." Hearings at 208.

Congressman Cheney of Wyoming also said:

> [I]t seems prudent to leave resolution of this flexible boundary to the courts, which have historically resolved such disputes in a case-by-case manner. . . .

Id. at 155. *Compare* his position here, that these "are political questions for the state legislature and beyond the institutional competence of the federal judiciary." (Brief of Wyoming Congressmen at 1).

14 *See* Brief of Hon. Max Baucus, *et al.* at 4-5; Brief of Wyoming Congressmen.

all of which may be passed on to out-of-state consumers. Plaintiffs' theory of discrimination arises from the premise that Montana selected coal as the subject of this extraordinary tax *because* taxing that commodity effectively selected out-of-state taxpayers to shoulder a tax burden grossly in excess of any costs imposed directly or indirectly by such taxpayers on the State.

The sponsor of the tax made the Montana Legislature aware, at the time it passed the tax, that long-term coal contracts would pass the tax on to ultimate consumers outside the State:

> In other words, the local companies simply add the additional taxes to their bill, and the *entire cost* is passed on to the purchasers in the Midwest or elsewhere.

Towe, *Explanation of Reasons for Montana's Coal Tax* 4. (Emphasis supplied).

A leading commentator urges that plaintiffs' theory of discrimination in the present form has "considerable force," noting:

> [O]ne may fairly contend that the State's effective selection of a class of out-of-state taxpayers to shoulder a tax burden grossly in excess of any costs imposed directly or indirectly by such taxpayers on the State places an unconstitutional burden upon interstate commerce.

W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245, 249 (1979).

Discrimination has many guises. It does not serve the salutary purpose of the Commerce Clause to limit its application to cases of blatant facial discrimination. Result-oriented tax policies may be just as effective in shifting tax burdens to non-residents as adoption of patently discriminatory rates. Proof of this effect presents no difficulty in this case. The bulk of present day Montana coal production—approximately 97% in 1980—derives from contracts entered into *before* adoption of the tax. (*See* Complaint ¶ 13; Apdx. 51a-52a). Not less than

90% of total tax payments have been shifted out of state in the manner contrived by the Montana Legislature.

The Solicitor General argues that the Commerce Clause was intended to create a "national Common Market" and "area of free trade" under which "the borders between states are essentially irrelevant." (Brief for the United States at 24). We agree, but the asserted application of that truism here turns the constitutional principle upside down. As we have shown, the Montana Legislature very carefully made the borders "relevant" by ascertaining that the principal burden of this tax would fall beyond its boundaries. In doing this, it unconstitutionally discriminated against interstate commerce.

III. THE TAX SUBSTANTIALLY FRUSTRATES FEDERAL ENERGY STATUTES

Montana does not squarely meet our claim that any state legislation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "frustrates the full effectiveness of federal law" is invalid under the Supremacy Clause. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977), *quoting Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971). Instead, defendants argue that national policies cannot preempt state laws (Brief of Appellees at 39-43), and in so doing completely ignore the numerous federal statutes which are the basis of plaintiffs' preemption claim (*see* Brief of Appellants at 5n.*).[15] Plaintiffs do not claim that the Coal Severance Tax is preempted by a "national

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15 The Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.* ("Fuel Use Act"), is but one clear example. It expressly states in its preamble that one of its purposes is to encourage the greater use of coal, and in fact specifically *mandates* the use of coal in lieu of oil and natural gas in some instances. (*See* Brief of Appellants at 36-37; Brief for the United States at 15-17).

policy", by itself, but by a series of federal laws, all reflecting the same national policy, which were designed to encourage the production and use of coal, and that these statutes have preemptive effect.

The Solicitor General—and virtually all of the opposing *amici* that have submitted their views to this Court[16]—are more realistic than Montana, agreeing with plaintiffs that a number of federal statutes reflect a national policy which favors the increased production and use of coal—including Western coal. They argue, however, that these federal statutes do not preempt the Coal Severance Tax because they do not reflect a Congressional intent to preempt state severance taxes or specifically, by their terms, limit the State's right to tax. (*See, e.g.*, Brief for the United States at 18-19; *see also* Brief of Appellees at 36, 39).[17]

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16 *See, e.g.*, Brief for the United States at 15; Brief of Wyoming, *et al.* at 19; Brief of North Dakota and West Virginia at 7. *See generally* Brief of Appellants at 35-41; Brief of Texas at 4-12; Brief of New Jersey, *et al.* at 4; Brief of Hon. Robert W. Edgar, *et al.* at 2; Brief of Kansas at 10-11.

17 Section 601(a)(2) of the Fuel Use Act, 92 Stat. 3323, 42 U.S.C. (Supp. III 1979) § 8401, is essentially irrelevant to the issue here. The central purpose of the Act is plainly to promote the use of coal. In considering the impact of that policy, Congress balanced those instances in which impact aid would be necessary to meet legitimate, energy-related costs against the proposition that those costs should not be the occasion of a windfall. *See* Transcript of the Joint Conference on Energy on the Powerplant and Industrial Fuel Use Act (Nov. 9, 1977) at 1869, 1878 [hereinafter cited as "Joint Conference Transcript"], *reprinted in* II U.S. Department of Energy, *Legislative History of the Powerplant and Industrial Fuel Use Act of 1978*, at 2-823, 2-832 (1978) [hereinafter cited as *"Legislative History"*]; Joint Conference Transcript at 1819, 1822, *reprinted in* II *Legislative History* at 2-774, 2-777; 123 Cong. Rec. 27915 (1977) (remarks of Sen. Randolph), *reprinted in* III *Legislative History* at 3-52. *See also* Joint Conference Transcript at 1824, 1833, 1852, 1853, *reprinted in* II *Legislative History* at 2-779, 2-788, 2-807, 2-808. It cannot fairly be said that Congress gave any attention at all to the proposition that state taxes could, in fact, frustrate the central purpose of the Act.

But arguments relating to "express preemption" and "Congressional intent" simply divert attention from the claims before the Court. (*See* Brief for the United States at 18-19). The Compiaints here assert that there is an actual conflict between the tax and the objectives of federal law. Such a claim is valid. As the Court stated in *DeCanas* v. *Bica*, 424 U.S. 351, 357 n.5 (1976):

> [E]ven absent . . . a manifestation of congressional intent . . . the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws. . . .

Accord, *White Mountain Apache Tribe* v. *Bracker*, 100 S. Ct. 2578, 2587-88 (1980); *Ventura County* v. *Gulf Oil Corp.*, 445 U.S. 947 (1980), *aff'g* 601 F.2d 1080, 1086 (9th Cir. 1979). As Professor Tribe put it:

> Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie federal enactments. Thus, *state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage.*

L. Tribe, *American Constitutional Law* § 6-24 at 378 (1978). (Emphasis supplied).

It is no objection to a claim of preemption that the Congressional statement of purpose appears in a preamble, rather than in the implementing sections of the statute.[18] *E.g.*, *Hill* v. *Florida*, 325 U.S. 538 (1945). There the Court found a conflict between the purpose of Congress expressed in the "Findings and Policy" of a statutory preamble and a Florida statute requiring a union's

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18 The cases cited by the Solicitor General (Brief for the United States at 15-16 n.10) are not to the contrary. None of those cases addressed the question whether state legislation was preempted when it frustrated the fulfillment of Congressional policies and objectives as expressed in statutory preambles.

business agent to obtain a license.[19] *Id.* at 541. No particular substantive section of the federal statute prohibited such state laws, but the Court nevertheless held that the state law was invalid because it "stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the preamble. *Id.* at 542. *Accord*, *White Mountain Apache Tribe* v. *Bracker*, 100 S. Ct. 2578 (1980); *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967).

Nor is it an objection to such a claim that the conflict between state and federal law does not appear in a head-to-head way on the face of the statute. The question is, does the state law, in practical effect, "substantially frustrate" the purposes and objectives of Congress. *E.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977); *Nash* v. *Florida Industrial Commission*, *supra*, 389 U.S. at 239; *Hill* v. *Florida*, *supra*, 325 U.S. at 542-43. (*See* Brief of Appellants at 41-45). Montana's attempt to distinguish the cases so holding misses the point. (*See* Brief of Appellees at 41-42). The simple fact remains that the state statutes at issue in those cases were preempted without any showing that Congress expressed an intent to preempt or of a direct head-to-head conflict between the particular provisions of the state and federal statutes. Substantial frustration of the purposes and objectives of the federal law is enough.

Significantly, defendants now admit that a trial is necessary to resolve the substantial frustration issue if the Court determines (1) that there is a policy to favor Western coal, and (2) that such a policy can form the basis of a preemption claim. (Brief of Appellees at 43 n.48). Plaintiffs have met that standard and are accord-

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19 The purpose of the National Labor Relations Act was "to encourage collective bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice." 325 U.S. at 541. *See* 49 Stat. 449-50(§ 1), 29 U.S.C. § 151 (1976).

ingly entitled to a trial to prove their claims that the Montana Coal Severance Tax has had, and continues to have, the effect of frustrating national energy policy by discouraging the production and use of coal, and particularly of Western, low-sulphur coal. (*See* Brief of Appellants at 45). This is necessarily a matter of degree, depending in part on the rate of the tax and the degree to which it interferes with federal purposes. *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 363-64 (1948). The Solicitor General specifically recognizes "the potential for the Montana tax to slow the increase in the use of coal"[20] (Brief for the United States at 15), and states that it is "conceivable" for frustration to occur (*id.* at 17). Only a full factual record can illuminate that question. Plaintiffs should not have been denied an opportunity to prove their claim.[21]

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20 *White Mountain Apache Tribe* v. *Bracker*, 100 S. Ct. 2578, 2587 (1980), expressly used the economic burden created by taxes as a basis for holding that the taxes were invalid because they "adversely affect[ed] the Tribe's ability to comply with the standard-yield management *policies* imposed by federal law." (Emphasis supplied). Thus, Montana's bald assertion (Brief of Appellees at 43) that "[n]o state tax has ever been invalidated" "because of the indirect economic impact that the amount of the tax may have" is plainly wrong. *See also Floral Park Tenants Ass'n* v. *Project Holding, Inc.*, 152 N.J. Super. 582, 378 A.2d 266, 275 (Ch. Div. 1977), *aff'd per curiam on other grounds sub nom. Project Holding, Inc.* v. *Smyth*, 166 N.J. Super. 354, 399 A.2d 1033 (Super. Ct. App. Div. 1979).

21 Defendants cite no case in this Court, or any other court, in which a substantial frustration claim was dismissed for failure to state a claim upon which relief could be granted, and we know of no such case. *Cf. Perez* v. *Campbell*, 402 U.S. 637 (1971). To the contrary, every case alleging "substantial frustration" cited by defendants or the court below—except those summarily finding preemption—was decided after trial, or, at least, after the plaintiff had had an opportunity to make a factual record.

IV. THE TAX SUBSTANTIALLY FRUSTRATES THE MINERAL LANDS LEASING ACT

Montana invokes Section 32 of the Mineral Lands Leasing Act, 30 U.S.C. § 189 (the "1920 Act"), to argue (i) that it deprives the 1920 Act of preemptive effect with respect to its central purposes, and (ii) that it "constitutes nothing less than Congressional permission for the state to enact the type of taxing measure at issue in this case." (Brief of Appellees at 10). The Solicitor General has joined in the first contention, but not the second. Both contentions should be rejected.

For purposes of this case, Section 32 is essentially neutral: "[T]he proviso [in Section 32] cannot give authority to the state which it does not already possess. . . ." *Ventura County* v. *Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980). The Act simply preserves the rights of the states "to exercise any rights which they may have" with respect to this vital national resource. 30 U.S.C. § 189. Section 32 was correctly construed by this Court shortly after its enactment to permit "any form of state taxation *otherwise lawful*." *Mid-Northern Oil Co.* v. *Montana*, 268 U.S. 45, 50 (1925). (Emphasis supplied). Montana's power is obviously subject to constitutional scrutiny and other relevant legislation. The italicized caveat vitiates Montana's argument that this Section granted it a power to tax without limit.

Montana's argument (Brief of Appellees at 12-15) that the legislative history of Section 32 manifests an intent to bestow on Montana an unlimited power to tax is invalid. The portions of "legislative history" on which Montana principally relies (Brief of Appellees at 12) relate to an early version of the Act which contained no proviso of the type later incorporated in Section 32. Representative Lenroot was speaking in 1914. No provision in any way

comparable to Section 32 even appeared until 1916—some two years after the cited debate.

In its original form, Section 32 stated that "nothing in the act shall be construed or held to *confer or limit* the rights of the States . . . ." 53 Cong. Rec. 1122 (1916). (Emphasis supplied). During the debate, the italicized language was amended, apparently for grammatical reasons, to read "affect." This change was simply intended to clarify the sponsor's original intention, that is, "to completely hurdle" the question of a state's right to tax output, to leave that question "absolutely alone." *Id.*

Although Congress has been aware that certain states tax the output of mines, it appears that it did not intend to approve such taxes when it amended the 1920 Act some five years ago. As Rep. Mink, the manager of the bill, stated with specific reference to Montana's tax (122 Cong. Rec. 515) (1976):

> "This matter, I believe, will be litigated, but it is certainly not intended to be covered by this legislation."

(*See also* Brief for the United States at 11 n.7).

At the time it enacted the proviso in 1920, Congress was told that the royalty and rental payments provided by the Act were not sufficient to cover legitimate impact costs. (*See* Brief of Appellants at 48-49). This view continued into the 1976 amendment, which increased both the states' share of federal royalties and the minimum acceptable royalties. At that time, Congress was once again solemnly advised that the Western states were suffering large impacts without sufficient revenues to cover legitimate costs. *See* 122 Cong. Rec. 495, 520 (1976) (remarks of Rep. Howe). State taxation was tolerated to meet such costs. Certainly Congress never meant that the states, through excessive taxation, could subvert the Act itself.

CONCLUSION

For each of the reasons set forth above and in the Brief of Appellants, the judgment below dismissing the Complaints should be reversed and the case remanded for trial.

Respectfully submitted,

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant Westmoreland Resources, Inc.

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
ANNE E. FONTAINE
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
THOMAS A. BUDEWITZ
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants except Western Energy Company

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